Office-Supreme Court, U.S.
FILED
JUL 29 1966
JOHN F. DAVIS, CLERK

No 394

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

ANTHONY D'ANTONIO, JOSEPH SPAGNOLI, LOUIS BARTEMIO and ARTHUR RACHEL,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To: The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States

Your petitioners, Anthony D'Antonio, Joseph Spagnoli, Louis Bartemio and Arthur Rachel, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on June 9, 1966.

JUDGMENT AND OPINION OF THE COURT BELOW

On June 9, 1966, the United States Court of Appeals for the Seventh Circuit affirmed a judgment of conviction entered in the United States District Court for the Northern District of Illinois, Eastern Division, sentencing petitioners to imprisonment for terms ranging from five to fifteen years.

JURISDICTIONAL STATEMENT

On a jury trial, petitioners were convicted of two conspiracies and of a substantive offense relative to interstate transportation of forged securities in violation of Sections 371, 471, 472 and 2314, Title 18, United States Code.

On appeal to the United States Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed by an Opinion filed June 9, 1966 (Appendices A, B).

A petition for rehearing was timely filed, and was denied on June 30, 1966 (Appendix C).

The jurisdiction of this court is invoked under the provisions of Title 18, United States Code, Section 1254(1).

QUESTIONS PRESENTED

1. When the alleged object of the conspiratorial agreement is to obtain money through the use of forged documents, does changing the nature or kind of forged document, during the furtherance of the object agreement, convert the agreement into multiple conspiracies?

2. Is a conspiracy one offense, or does the diversity of its objects, to-wit, the agreement to commit different but related offenses involving counterfeit obligations, transform the single agreement into multiple conspiracies?

3. Has not the law of conspiracy been misused as an evidentiary ploy to advantage the government, freely employing an open doctrine of vicarious liability to the extinction of the basic tenet of individuality of guilt?

4. Has not a single conspiracy been clearly fragmentized when a single overt act will sustain a double conviction and double penalty?

5. Is the seriousness of error diminished by the length of the trial, so that misconduct which is deemed plain error in a short trial, is deemed harmless, though preserved by objection in a long trial?

STATUTES INVOLVED

The relevant portions of all statutes are set forth within Appendix "D." The Statutes are:

a) Title 18, United States Code, Section 371.

b) Title 18, United States Code, Section 2314.

c) Title 18, United States Code, Section 471.

d) Title 18, United States Code, Section 472.

STATEMENT OF THE CASE

There is no printed record in this case. The trial transcript of some 7,000 pages is beyond the resources of the petitioners to produce in written form. The Court of Appeals excused the filing of a printed appendix. Page references here are to the original transcript.

Should your Honors deem this case worthy of review, petitioning counsel will deem themselves impressed with a duty to present to this Court, a record in such form as the Court may prescribe.

This cause commenced by the filing of an indictment in four counts on May 8, 1964, charging, in Count 1, that these defendants and others, named as defendants, did conspire with each other and with certain other persons, thirteen in number, not named as defendants, to transport in interstate commerce counterfeit Bank of America Travelers Cheques in violation of Section 2314, Title 18, U.S.C.

The second Count charged that these defendants, and other named defendants, and four persons not named as defendants, did conspire to counterfeit Series "E" United States Savings Bonds, in violation of Section 471, Title 18, U.S.C. and to pass utter, publish and sell, and attempt to do the same, the said Series "E" United States Savings Bonds in violation of Section 472, of Title 18, U.S.C., in Count 3, Anthony D'Antonio, Louis Bartemio, Arthur Rachel and Joseph Spagnoli were charged substantively with a violation of Section 471 of Title 18, U.S.C., the counterfeiting of a Series "E" United States Savings Bond, Serial No. 361,337,425-E, of a hundred dollar denomination. (C.L. Record 11-16) None of petitioners were charged in Count 4 of the indictment.

The case proceeded to trial on December 8, 1964, and continued on succeeding court days through January 26, 1965. On January 26, 1965, the petitioners were sentenced as aforesaid. On appeal to the United States Court of Appeals for the Seventh Circuit, the judgments were affirmed.

The Evidence

The evidence adduced in this case is briefly stated here for the reason that practically all of it offered against these appellants came through the testimony of Vito Zaccagnini and Sandra Hafford. Aside from their testimony, there were witnesses who testified as to the counterfeit nature of Government bonds and Travelers Cheques and testimony from witnesses who were employees of banks and savings and loan associations where many of the checks and bonds were cashed. The jury, by its verdict as to some of the defendants, apparently believed the two principal Government witnesses who incidentally were the only ones who directly implicated the defendants in this cause.

The appellants realize that this court will not determine questions of credibility. It should be pointed out, however, that three of the defendants in this cause, Arthur Gasparro, Peter Cappelletti and Roy Nielson were found not guilty, even though Zaccagnini and Hafford heavily implicated these three defendants as well as the others in their testimony. It can only be concluded that because there was no corroboration of Zaccagnini and Hafford's testimony regarding three, the jury found them not guilty. In view of the background of these two Government witnesses and the nature of their testimony, we urge this court to measure the error asserted here against this backdrop.

Zaccagnini was a convicted murderer and forger. Hafford was a prostitute and the cast-off common law wife of the appellant, Spagnoli.

The Government proved that the Bank of America Travelers Cheque exhibits introduced into evidence were counterfeit. Similarly, the $100 U.S. Savings Bonds "Series E" exhibits were also counterfeit. No question is raised as to the sufficiency of the evidence.

According to Zaccagnini and Hafford, the checks and bonds were printed in a rented trailer in Melrose Park, Illinois, by Louis Bartemio and Arthur Rachel. They were further processed, cut and trimmed by Spagnoli, Zaccagnini, and D'Antonio, whose participation was limited to the checks. They were passed, according to the Government's evidence, by Joe Campion, Roy Nielsen (who was found not guilty) and Vito Nitti. Other conspirators "interested" in the operation were Arthur Gasparro and Pete Cappelletti, both of whom were found not guilty. There were thirteen passers named as unindicted co-conspirators. The evidence as to these persons consisted of the testimony by Zaccagnini and Hafford in which they identified pictures of these individuals. None of these unindicted co-conspirators were called to testify and outside of several tenuous identifications by so-called victim witnesses, there was no direct evidence linking any of these unindicted co-conspirators to the appellants.

The government also introduced some fingerprint evidence against petitioners Spagnoli, Bartemio and Rachel. The bulk of the testimony, however, outside of Zaccagnini and Hafford, consisted of evidence by witnesses who were employees of banks, saving and loan associations and other

business establishments where the checks or the bonds were cashed by unidentified persons. (The only identified defendant in the whole case was Joe Campion, who upon his defense, admitted that he cashed some of the bonds but stated that he was forced to do so under pressure by Zaccagnini.) The government and the defendants stipulated as to nearly all of this type of testimony. The witnesses came from many different cities and States and it is conceded that these checks were passed in many areas other than in Chicago, Illinois. None of the victim witnesses, however, could identify any of the defendants (other than Campion).

The defense to this cause so far as it is material here will be discussed where appropriate in certain of the points raised in the argument contained herein. Basically, all of these defendants except Campion denied his guilt. Campion's defense was that he was coerced and threatened and did some of the acts alleged under duress.

REASONS FOR GRANTING THE WRIT

1. The increase in abuse of the conspiracy laws, as exemplified by the charges and the trial in this case, is one for the exercise of this Court's supervisory power over the modes of conducting federal criminal prosecutions within the rule of *McNabb* v. *United States,* 318 U.S. 332.

2. Enhancing punishment at the discretion of the prosecutor through the expedient of fragmentizing a single offense is contrary to this Court's policy of lenity recognized in *Ladner* v. *United States,* 358 U.S. 169; *Bell* v. *United States,* 349 U.S. 81, and *Prince* v. *United States,* 352 U.S. 322.

3. The ruling of the United States Court of Appeals for the Seventh Circuit that a violation of Rule 15 of the canons of professional ethics of the American Bar Association is prejudicial error, conflicts with the decisions of the Second Circuit in *United States* v. *White,* 324 F.2d 814 and the Fourth Circuit in *Greenburg* v. *United States,* 280 F.2d 469; and sanctioning the vouching for the content of the testimony of unused witnesses directly conflicts with the decision of the Fifth Circuit in *Nalls* v. *United States,* 240 F.2d 707 and *Ginsburg* v. *United States,* 257 F.2d 950, in the latter of which the error was considered plain as effecting substantial rights.

I.

AS TO THE ABUSE OF THE DOCTRINE OF CONSPIRACY

Your Honors, ". . . have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 404 (1957).

The warnings have been ignored.

The bald fact is that the pronouncements of this court concerning conspiracy prosecutions, have been almost totally ineffective. The conspiracy charge is too handy and powerful a weapon, to be used with restraint.

The conspiracy mystique has generated a paralogical vernacular of its own, with each conclusion implicit in its premise. Thereby, the appearance of scrupulous adherence to this court's rulings is painstakingly preserved, while the rulings themselves are effectively circumvented.

If there has been a criminal action brought in recent years in the district of moving counsel, involving more than one defendant, in which a charge of conspiracy has not been made, it has escaped the attention of the writers. Even when a defendant is singly charged, it is not uncommon to charge him with conspiracy in addition to any substantive offenses, in order to facilitate the reception of the private conversations of government witnesses.

The conspiracy charge has become an evidentiary technique—a piece of trial strategy and nothing more. It is an attempt to capitalize on the total absence of any rule of evidence or of pleading which is generally supposed to be one of the attributes of the conspiracy prosecution. It serves to lengthen trials beyond anything fairly required for a trial of the legitimate issues; and the very length of the trial will often, as here, preclude consideration of any claims of error. It hopelessly infects B with evidence of A's guilt. It capitalizes upon an accepted set of jury instructions supposed to apply to all such cases, amounting to a litany, with its lengthy list of the things that the prosecution need not prove and its denunciations of the secretiveness of the conspirators as excuse for any lack of evidence.

It is, in short, an attempt—generally successful—to deflect the jury from any reasonable consideration of the issues.

All these faults are present in abundance in the case at bar. There is also an innovation which fairly demonstrates the hardihood of the conspiracy charge, and its ability to thrive and proliferate in arid soil.

The multiple conspiracy charge

The prosecution sought, and certainly found, the answers to all of its problems by relying on the conspiratorial theory of guilt. So eagerly did the government seek the evidentiary benefits which it hoped to find within 18 U.S.C. 371 that it charged *two* conspiracies among the same supposed conspirators during essentially the same period of time. For surely, if the admission of questionable evidence is facilitated by a conspiracy charge, two conspiracy counts will provide twice as much help. Gleefully, the prosecution doubled the permissive penalty for conspiracy by the simple expedient of charging two conspiracies.

From about January of 1963 to about March of 1964, it was charged, the defendants conspired to traffic in forged checks (Count 1). For the last seven months of that same period, it was further charged, the same defendants also conspired to traffic in forged bonds (Count 2). But this was not, the government protested, a single conspiracy with two closely similar objectives.

Rather, it was two conspiracies.

Every inference from the indictment, and every intendment of the proofs, was that the prosecution considered the defendants a group of people banded together for the purpose of making and passing counterfeit securities. The

government's principal witness testified that in the midst of the distribution of the checks, four of the conspirators gathered at the home of one of them and saw an advertisement for Series E bonds in a magazine. Thereupon, he testified it was decided that the defendants would take on a line of counterfeit bonds in time for the Christmas rush—literally that! (Tr. 659-666)

The government considered that a second conspiracy was thereby formed, even while the first was still in operation. The disturbing feature of that concept is that as a logical corollary, the number of conspiracies that can be charged in almost any prosecution, is limited only by the government's stenographic resources. Very obviously, and with equal felicity, the government might have charged that each bond and each check was the product of a separate conspiracy. The logic is unassailable, granted the premise.

And just as surely as lawyers read case reports, and just as soon as the decision below can be embellished with the notation *"Cert. Den."*, will commence the indiscriminate proliferation of that very tactic. The only possible fault that a prosecutor could ever have found in the conspiracy statute, was its modest penalty limitation of five years. That difficulty has now been effectively overcome.

Petitioners[1] were convicted under both conspiracy counts. And each was sentenced to consecutive maximum sentences for each of the alleged conspiracies.

This result is all the more startling when one considers the standard conspiracy ploy as used in the case at bar. The jury were given the standard instruction that it was un-

[1] Except D'Antonio as to whom count was dismissed on the government's motion.

necessary to plead with precision the time of the conspiracy and the identity of the conspirators (Gov't Instructions 52 and 56). It was also vigorously instructed on the doctrine of vicarious liability for acts not contemplated by a given defendant (Gov't Instructions 63 and 64). It was also made clear to them, that a defendant was retroactively liable for conspiratorial acts done prior to his joining the conspiracy (Gov't Instructions 47, 59). Government's Instructions 65 and 66 could only have had the effect of advising the jury that a defendant was liable for the counterfeiting of bonds even though he might have thought that he was joining a conspiracy which had as its sole objective the counterfeiting of checks. Evidence of participation in one conspiracy, therefore, was evidence of participation in both. In those circumstances, the imposition of consecutive sentences for two supposed conspiracies, is indefensible.

The issue gains special poignancy when it is considered that the jury was twice instructed that proof of *one* overt act would be sufficient, with other evidence, to justify conviction under *both* conspiracy counts (Gov't Instructions 47 and 49). Government Instruction 49, so far as material, advised the jury that if, together with other evidence, "... *one* of the overt acts alleged was knowingly done, ... proof of the conspiracy *offenses* charged is then complete ... regardless of which of the conspirators did the overt *act.*" (Emphasis ours). Thus, the jury was unequivocally told, over defense objection, that any single overt act would be sufficient to convict under both conspiracy charges. On that basis, it simply defies reason that consecutive penalties can be imposed under the conspiracy counts.

Petitioners respectfully submit that quite apart from any other issue, they have been punished and—perhaps more important—tried twice for a single offense of conspiracy.

United States v. *Quong*, 6 Cir., 1962, 303 F.2d 499, 506; *United States* v. *Klein*, 2 Cir., 1957, 247 F.2d 908, 919. *Braverman* v. *United States*, 317 U.S. 49, cited in the Court of Appeals' opinion, is not considered by petitioners as authority for a contrary view, but rather as supporting their position.

Petitioners (D'Antonio excepted) received a fifteen year penalty for a substantive offense, to run concurrently with their two successive five year conspiracy sentences.

But the complaint is in no way limited to the length of the penalty. Indeed, serious as that issue is, it is almost of lesser significance.

For we urge to your Honors that the abuse of the doctrine of conspiracy during the trial resulted in an evidentiary nightmare: An eerie morass from whose bourne no issue of fact ever returned in recognizable form. And the evidentiary defects must necessarily taint the convictions as to all counts.

The case proceeded in the trial court on a premise fairly to be encapsulated by the assertion that since two conspiracies were charged, *no* rule of evidence applied. The trial was, as noted by the Court of Appeals, quite lengthy. Incredibly lengthy, we would add, considering the essential simplicity of the real issues. There was truly a fearful amount of *testimony*; but the testimony resulted in very little legitimate *evidence*.

In contemplation of law, of course, the evidence against any given defendant is the same, regardless whether he be tried singly or as one of a large group. It is *his* acts and declarations which are considered against him. Once he is found, by competent evidence of his own acts and declarations, to be a member of a conspiracy, he may bear

vicarious liability for the overt acts. In theory, the only basis for the admission of hearsay in a conspiracy case is that the statement is attributable to the non-declarant because he has already been shown, by evidence *aliunde,* to be a conspirator; that it proves a vicarious offense by the non-declarant; and that—an absolute *sine qua non*—the statement was made "pursuant to and in furtherance of objectives of the conspiracy charged in the indictment." *Krulewitch* v. *United States,* 336 U.S. 440, 442-443.

It has been aptly observed that the foregoing requirement imposes a very great deal "more than a test of relevancy." 72 Harvard L. Rev. 985-986. But a mere test of relevancy is vastly to be preferred to no test at all. Once the bars have been let down, deflection of the jury becomes a certainty.

In that light, an incident which occurred in the early stages of the trial has great poignancy. Government witness Zaccagnini was asked to relate a private conversation with a third party named Pascucci. No defendant was present. The defense objected to the conversation. Thereupon, the trial court inquired of the prosecutor concerning Pascucci, who had "not been identified as a defendant here yet." (Tr. 546) "(Is he) a co-conspirator?", asked the trial court, perhaps assuming a conspiracy to exist. The prosecutor replied that Pascucci was indeed a co-conspirator. On that basis, the trial court denied the objection, and instructed the jury that the private conversation between Pascucci and Zaccagnini might be considered for the sole purpose of determining whether there had been a conspiracy: "A link in the chain." (Tr. 546-547)

A short time later, in ruling admissible a subsequent private conversation between Zaccagnini and Pascucci, the trial court was even more explicit. The jury were told

that the evidence was a proper method of proving the existence of a conspiracy because Pascucci was "one of the alleged conspirators" (Tr. 550).

This tight logical spiral, having neither entrance nor exit, was fairly representative of the basic prosecution tactic. Admit hearsay to determine the *existence* of a conspiracy, and if we find a conspiracy, then consider the hearsay!

That evidentiary deficiency permeated every aspect of the trial. Almost none of the numerous hearsay objections was sustained. At the conclusion of the trial, the jury was, to be sure, invited to consider only the acts and declarations of each defendant in considering that defendant's guilt. But all evidence had long since been admitted against all defendants. And in the course of the instructions, the jury were also told, over defense objection, that:

a. A defendant could be convicted because of the acts of another "willfully ordered, directed, authorized *or consented to* by the defendant" (Government Instruction 8, emphasis ours.) Thus, the jury were told that a defendant was guilty of conspiracy if others conspired while he merely "consented". And obviously, that flagrant error taints the convictions on each of the counts, since each of the defendants knew the others well, and was deemed guilty if any one of them committed a crime with the other's "consent".

b. That membership in a conspiracy may be determined, as to any given defendant, by "evidence which relates to him either expressly or impliedly" (Government Instruction 58). The quoted instruction is a simple *carte blanche* to consider the entire evidenciary hodge-podge as to each defendant. And any piece of evidence that the

jury might consider proof of a given defendant's membership in a conspiracy may or may not have been competent proof of that defendant's own acts and declarations, but it certainly must have "related to him", at least "impliedly", because A had said that B had said that C had done something with D's "consent". An orderly consideration of the guilt or innocence of the defendants was thereby rendered literally impossible.

Of the 71 instructions tendered by the government, the bulk may be characterized as "stock"—so much so that this court will note that they are mimeographed and are equally applicable to almost any criminal case. The instructions specially drawn relate to the nature of the charges in the indictment, and 22 argumentative instructions on the issue of conspiracy, 21 of which were given.

Taken as a group, they sufficed to advise the jury that they are not bound by any rule of evidence or pleading in considering guilt on the conspiracy charged.

It is against that background that we ask your Honors to consider the nature of the proofs introduced in this case. The government's principal witness was confessed participant Zaccagnini. Obviously the jury did not accord him the requisite degree of belief to warrant conviction. The jury acquitted three defendants accused by him with the same certitude with which he accused appellants. (Neilsen, Gasparro, and Cappelletti). The question of the nature of the corroboration, therefore, assumes critical significance. But the principal "corroboration" consisted in conversations with third parties or with one defendant, admitted against all on a theory of conspiracy. The government's principal technique of corroboration was to call upon a witness, most significantly confessed participant Sandra Hafford, to recite conversations with A in

which B was incriminated, or to testify to a meaningless act which she saw A perform and then a subsequent conversation in which that act was explained by A as being a wrongful act on the part of B. Most of Hafford's testimony related to the conversation of Spagnoli, with whom she had lived and toward whom she held great malice. The vast majority of these conversations were simply narrative in nature, not tending to advance the conspiracy in any conceivable way; but all were admitted in evidence. A typical illustration was the testimony that Hafford had, at a critical juncture, observed Spagnoli making a telephone call. Later, she testified, Spagnoli volunteered the information that the call was to Bartemio. (Tr. 3381) That evidence was duly admitted against Bartemio. On another occasion, Hafford also testified that, in idle conversation, Spagnoli had discussed Campion with her. According to Hafford, Spagnoli said that Campion was a good man, had always paid when he passed counterfeit checks and would therefore be entrusted with passing counterfeit bonds. (Tr. 3273). That evidence was admitted as corroboration against Campion.

Again, in yet another idle conversation, Spagnoli was said to have told Hafford that he had contacted Bartemio because Bartemio had made the counterfeit checks and now would make the counterfeit bonds. That evidence was, of course, considered against Bartemio. (Tr. 3306-3307)

On yet another occasion, Hafford testified that Spagnoli had received a call from Bartemio, telling him that "his friend was ill". (Tr. 3355-3356) Much later, she casually inquired who the friend was. Spagnoli privately explained to her that Bartemio had meant that the press used in the counterfeiting, had broken down. (Tr. 3357-3359) This evidence, likewise, was admitted to prove that Bartemio was a counterfeiter and a conspirator.

On yet another occasion, Miss Hafford was permitted to testify that she told defendant Rachel and his sister, Joanne Rachel (mentioned nowhere in the indictment, but of whom more will be said later) that Bartemio and "the fellows" were going out to pass counterfeit bonds, and that she hoped they would do better than they had done before. (Tr. 3432) That evidence was, presumably, admitted against Bartemio and "the fellows."

In short, the rules of evidence were almost totally disregarded because the indictment charged conspiracy, as indictments are wont to do.

Those illustrations do not exhaust the list, by any means. They are merely a very few examples of the basic prosecution trial tactics, which occurred so frequently that it permeated the entire transcript.

We think it obvious that the inadmissible material introduced under the guise of conspiracy, must necessarily have deflected the jury in its consideration of the substantive counts as well as the conspiracy counts. *United States* v. *Johnson,* 4 Cir. 1964, 337 F. 2nd 180, 204. In essence, all evidence literally applied to all counts.

The confused nature of the transcript in this case, which literally defies abstracting, points up the nature of our complaint: that the conspiracy charge, as prosecuted in the trial below, serves virtually to deprive defendants of all opportunity for a meaningful defense. They are judged not by their own acts, but by the casual narrative statements of others. Testimony is heard in confused bushels, and suspicion is corroborated by hearsay.

That issue is particularly meaningful because of the present tendency toward longer and longer trials, larger and larger numbers of defendants, and, of course, the ever

present conspiracy charge. We do not ask that your Honors find any inherent flaw in the conspiracy statute. Our complaint is directed only to the manner in which that statute has been applied, in this and in innumerable other cases, more frequently and more extensively with every passing day.

In 1934, Clarence Darrow rendered a memorable admonition:

> "If there are still any citizens interested in protecting human liberty, let them study the conspiracy laws of the United States." (*The Story Of My Life*, 64).

Today, one short generation later, no lawyer could ask any greater advantage, in defending a conspiracy charge, than to be subjected to the rules of practice which Darrow found onerous.

The trend will not reverse itself. We pray, fervently, that your Honors will take this occasion to command the overdue reversal of that trend.

PREJUDICIAL MISCONDUCT ON THE PART OF THE PROSECUTORS

As previously noted, the plethora of incompetent evidence admitted on the conspiratorial rationale, had the inevitable effect of prolonging the trial.

Inevitably, that prolongation had the effect of deflecting the jury from a reasonable consideration of the legitimate issues.

But it had a further effect: the outcome of the appeal was determined by the length of the trial—that, from the face of the opinion of the Court of Appeals.

Thus, the conspiracy charged continues its invidious work beyond the trial stage. Its invitation to incompetent evidence served to lengthen the trial, and that very length is deemed to detract from the seriousness of the errors.

In this day of longer and longer trials, it seems most unfortunate to put a premium on their very length, as the Court of Appeals has done. The length of the trial below was the result of a yielding to a prosecutive temptation to throw in every conceivable element of evidence, regardless of its relevance or its admissibility. The very length of the trial was sufficient to assure bankruptcy to any defendant of normal means who desired counsel privately engaged. The length of the record assured that no defendant or group of defendants of ordinary means, could have it printed.

Such considerations obviously cry for an admonition to prosecutors, to hold the length of trials and complexity of charges to a minimum consistent with the demands of justice.

Instead, the opinion below issues an open invitation to the prolongation of trials, and a broad hint that the seriousness of error is somehow diminished by the length of a trial. It is as though the reviewing court were prepared to tolerate a certain quantum of error per day—the more days, the greater the quantum of tolerable error.

The message will not be lost. The hint is too broad to ignore. A bonus, in the form of permissive error, is extended to any prosecutor whose ingenuity can prolong a trial. The very tactic which impedes the ability to defend, will henceforth inhibit the right to review.

The opinion takes note of the impropriety of the following excerpt of the prosecutor's argument to the jury:

> "You can rest assured that we determine before we put them on the stand that what they told us was the truth".

The Court of Appeals concludes, however, that this "infraction" and "minor error" does not warrant a reversal. And the opinion further states that the remainder of the argument was "proper advocacy".

Sub silentio, the opinion characterizes as "proper advocacy" the following statement, which could only be understood by the jury as explaining *how* the government verified its information:

> "Now, you may gather further that we get a lot of information from people whom we can't use or who won't testify for obvious reasons". (tr. 19, Jan. 25, 1965).

This is not "minor error". This was a flat statement to the jury that the government had verified the evidence of its witness, by inquiry to other people who refused to testify for "obvious reasons". The impropriety of such a statement is well established. *Nalls* v. *United States,* 5 Cir. 1957, 240 F.2nd 707, 710.

Defense objections and motions for mistrial were denied. They should not even have been needed. A very much less offensive but similar statement was rightly denounced as "plain error" in an opinion which explained: "It is such an error, also, as would have been magnified as to its influence on the jury by an objection and motion for mistrial. It made it so unlikely that the appellant could be given a fair trial, as the term is understood in our juris prudence, that we hold it to be a reversible error." *Ginsberg* v. *United States,* 5 Cir. 1958, 257 F.2nd 950, 955.

The offending remark in *Ginsberg,* related only to the possible availability of witness to controvert the defendant's evidence of good character. How infinitely more serious is the evidence here, where the prosecutor tells the jury that he has verified the defendants' guilt by information from people who were, he inferred, afraid to testify.

If this be "minor error", the right of review is literally meaningless.

The opinion takes note of "testimony of a government witness that defendant Rachel admitted to her that he had once made $5 bills". But, the opinion continues, "this evidence, although relating to an independent offense, was admissible for the purpose of showing knowledge and intent".

On its face, that assertion is somewhat startling. Rachel was prosecuted on the theory that he corruptly printed Bank of America Traveller's Checks and Government Series E Bonds. There was not, and there could not have been, any contention that Rachel actually thought that he was printing Christmas cards.

With due deference to the Court of Appeals, that evidence cannot be justified on any reasonable theory. With equal logic, a murder case could be proved by a showing that the defendant had previously committed other murders —thus, "knowledge and intent".

Obviously, the government could not have proved Rachel guilty of this counterfeiting offense, by showing an earlier *conviction* for counterfeiting. Yet, how much more reliable that would have been, than the evidence cited in the opinion.

The legitimate proof of guilt of the defendant Rachel was precarious in its nature. This is particularly true as to the conspiracy charge, which formed the basis for the admission of the bulk of the evidence against him. For Rachel was not a true conspirator, even by the government's theory. He was, the government theorized, a producer of counterfeit, whose position was much closer to that of a vendor to the other defendants than that of conspirator with them. *United States* v. *Ford*, 7 Cir., 324 F. 2d 950, 952.

Against Rachel, the government delivered a series of crushing and unfair blows. The prejudice to Rachel is patent. And since all the evidence was admitted against all the defendants it must necessarily follow that error to one is error to all.

Accomplice witness Hafford was permitted to testify that she met Rachel at his sister's home. Thereupon, she asked him whether he was the person who once had made counterfeit dollar bills. According to her testimony he answered that he had, but they were really no good; that he was almost arrested; that he had given some to a girl who had in fact been arrested, and that the authorities had been looking for him. (Tr. 3234, 3444-3445)

That testimony, needless to say, was given over objection, and was further the basis for a motion for mistrial by all defendants, which motion was denied. (Tr. 3434-3443). The government successfully argued that it was entitled to show "knowledge, ability, know-how on the part of any one of the defendants to know how to counterfeit." (Tr. 3438)

By that means, and for no proper purpose, the government was permitted to make direct proof that at some unspecified time, the witness Rachel had:

A. Produced counterfeit five dollar bills;

B. Been sufficiently lacking in gallantry to cause the arrest of a "girl" by exposing her to such influences;

C. Got away with his misdeeds, leaving the girl to suffer, and

D. Become a fugitive.

This evidence was much more prejudicial than that which impelled the Seventh Circuit to reverse in *United States* v. *Magee*, 261 F.2d 609. This was a flat attempt to prove one crime by evidence of another. Even if we assume that Rachel not only admitted the earlier offense but in fact committed it, the government was not entitled to make out its case against Rachel by proving that he was a confirmed counterfeiter, or anything remotely as silly and incompetent as that.

And the evidence had no legitimate purpose—none at all. Not even a pretext. It was totally unrelated to the alleged check and bond venture. There was no issue of identity, or intent, or guilty knowledge, or common scheme which was resolved in any way by that evidence. It was a simple piece of mud-slinging.

We anticipate the government's response that this error is harmless because of the mass of other evidence. But we have already alluded to that mass of other evidence, which is much more mass than evidence. And after all, the government was the best judge of the impact that its evidence was making. Its apprehension turned out to be

quite realistic in view of the acquittal of three of the defendants. If the government had truly felt that its evidence was "overwhelming" (to use a stock phrase which has poignant irony in the context of this case), it would never have used evidence such as that here complained of. It would instead have zealously guarded against the possibility of error. That evidence was used because it was needed. And it is sickeningly prejudicial.

Yet another instance of the intemperate nature of the prosecution related to the simple nastiness with which it undertook to prove, quite unnecessarily, an illicit relationship between Rachel's sister and Bartemio. The government lost no opportunity to inject this note against both Rachel and Bartemio; and it was elicited deliberately, unnecessarily and without legitimate purpose.

It was first brought out in the testimony of Agent Plichta, who testified that when he found Miss Rachel living on the premises where he arrested Bartemio. The prosecutor literally extracted that testimony from his witness on "voir dire" (Tr. 1408), and then dragged it out again, complete with bedroom references, before the jury (Tr. 1430-1431).

Government agent Sims then testified, without apparent purpose, that he saw Bartemio and Miss Rachel leave yet another residence, and drive off in a car (Tr. 2999). And, of course, Miss Hafford did not miss the opportunity. She testified that she saw Joanne Rachel in January, 1964 with a suntan, and that Miss Rachel told her, in response to her inquiry, that she had been with Bartemio and her brother in Florida since before Christmas. There was no suggestion that the trip had any purpose relating to counterfeiting, but the prosecution simply could not resist the temptation to use anything nasty that it could possibly

find. (Tr. 3401-3402) And that type of evidence was elicited deliberately and repeatedly. (*Cf.* Tr. 3303, 3427-3428)

That evidence necessarily infected the jury's determination as to all appellants. Even by the most conservative statement of the rule, incompetent and prejudicial evidence directed against defendant A in his joint trial with defendant B will cause reversal to both A and B unless that evidence would have been competent if B had stood trial alone. And by the same conservative test, inadmissible material introduced to support a conspiracy charge will necessarily impel reversal as to jointly-tried substantive counts as well. *United States* v. *Johnson,** 4 Cir. 337 F. 2d 180, 204.

Certain of the prosecution evidence represents a clean break with every known concept of pertinency. Petitioner D'Antonio sought to prove, and did prove, that when his house was raided no counterfeiting material or counterfeit documents were found. (Tr. 5394-5395) He plainly announced that he was asking only about counterfeiting materials, and was not directing his questioning to any other issue or to anything else that might have been found in the search (Tr. 5379-5384). Nevertheless, by a reasoning process which remains obscure to petitioning counsel, this was deemed to "open the door" to irrelevant issues. Accordingly, the prosecution was permitted to prove that the raiders had found a radio capable of receiving the suburban police frequency, as well as certain burglary equipment, none of which had any relevance to the counterfeiting charge, all over vigorous defense objection. (Tr.

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* This case was recently reviewed, and the reversal of conviction affirmed, by this Court. 865 S.Ct. 749. However, the issue as to which we cite that case, was not involved in your Honors' review.

5396-5399; 5884-5892). This evidence, tending to prove that even if D'Antonio was not a counterfeiter he should be convicted anyway because he is probably a burglar, was admitted against all defendants. After all, they should be more careful about the character of their circle of acquaintances; if not, they, too, can be punished for counterfeiting because an acquaintance is a burglar. This is known as the conspiratorial theory of vicarious liability.

Perhaps the most serious of the irregularities found the trial judge enlisted as a witness for the prosecution. Petitioner Spagnoli introduced testimony from himself and his son, that when his seized property was returned, the same prosecutor present in the courtroom had told him "We know you are innocent, Joe," or words to that effect. This was done, they testified, in the presence of a secret service agent. (Tr. 6029-6030; Tr. 6213-6214).

The prosecutor never denied that such a conversation had occurred. Nor was the secret service agent called to rebut the proposition. Rather, the prosecutor sought and obtained the services of the trial judge as his witness, by a viciously unfair tactic.

The receipt for Spagnoli's property was dated July 16, 1964. It was not shown that the property was delivered on the day the receipt was prepared. Instead, it was shown that on July 16, 1964 the prosecutor in question had been on trial before the same trial judge in Freeport, Illinois. As the prosecutor cunningly phrased the issue in cross-examining the defendant:

> "Q. Now, Mr. Spagnoli, would it refresh your recollection if I were to tell you that on the date that receipt bears, July 16, 1964, that I was in Freeport,

> Illinois, trying a case before his Honor Judge Perry, in a jury case that lasted for one week? Would that refresh your recollection?"

When the defense objected, the trial judge joined the fray:

> "The Court: Objection overruled. Mr. Sikes is showing him a paper that bears a date and he is calling it to his attention, to refresh him, and pointing out where he was at that particular time, trying a case in Freeport, and that happens to be true. The record is correct.
>
> Mr. McDonnell: I reserve a motion, if the Court please.[2]
>
> The Court: The motion is denied. The public record will show Mr. Sikes was in Freeport trying a case before me for that whole week. Proceed. Ask the question, that now having been brought to your attention." (Tr. 6266-6267).

The court then denied the defense mistrial motion based on his own statement, which he ruled to be proper. All these events occurred in the presence of the jury.

By that means, the prosecutor was enabled to obtain a clear expression from the trial court that petitioner Spagnoli, to the trial court's personal knowledge, was a liar. The record, however, clearly *does not* show that Spagnoli was a liar; instead, it shows that the trial judge was misled. By the simple expedient of assuming, without proof,

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[2] It is the practice of the presiding Judge J. Sam Perry to utilize what is known as a "reserved motion". Judge Perry will not tolerate a motion for mistrial made in the presence of the jury and a reserved motion connotes that a motion for mistrial will be made either immediately upon the jury's being removed from the court room or at the earliest opportunity, or at whatever opportunity the Court permits the motion.

that the date on the receipt was the date of the conversation, and that the prosecutor could not have been in both Chicago and in Freeport that day (no great trick), the prosecutor obtained a judicial declaration, before the jury, on a bitterly contested fact issue, while substituting innuendo for proof.

That would require reversal had the act been only that of the prosecutor. *U. S.* v. *Soçony-Vacuum Oil Co.*, 105 F.2d 809, 839, reversed on other grounds, 310 U.S. 150; *Ginsberg* v. *United States*, 5 Cir., 257 F.2d 950, 955. But the prosecutor was not alone. The participation by the trial judge in the status, virtually, of witness for the prosecution, must be deemed fatal to any chance for an impartial trial.

CONCLUSION.

Petitioners suggest that they were convicted more by the nature of the charge preferred, than by the evidence. The unfairness of their trial was implicit in the multiple conspiracy charges, and was magnified by the apparent unwillingness of the prosecutors to be bound by the most fundamental standards of fairness.

They pray that your Honors will deem this case worthy of review.

Respectfully submitted,

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